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IN THE  
Supreme Court of the United States

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October Term, 1952

No. ~~538~~ MISC.

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*Record  
not printed*

ROBERT NORBERT GALVAN,

*Petitioner,*

*vs.*

U. L. PRESS, Officer in Charge, Immigration and Natural-  
ization Service, United States Department of Justice,  
San Diego, California.

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT.

✓  
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*To the Honorable Chief Justice of the Supreme Court of  
the United States and the Associate Justices of the  
Supreme Court of the United States:*

Your petitioner, Robert Norbert Galvan, respectfully  
prays for a writ of certiorari to the United States Court  
of Appeals for the Ninth Circuit to review a judgment of  
that Court entered on the 9th day of January, 1953,  
affirming a judgment of the United States District Court  
for the Southern District of California, Southern Di-  
vision, entered January 23rd, 1952, denying a petition for  
a writ of habeas corpus; and refusing to issue a writ  
of habeas corpus upon said petition. Said decision of the  
Court of Appeals is reported in 201 F. 2d at pages  
302-306. [R. 27-34.]

### Statement of Matter Involved.

The petition recites [R. 2-5] that Robert Norbert Galvan is unlawfully imprisoned, detained, confined, and restrained of his liberty by the Commissioner of the United States Department of Immigration and Naturalization, and by U. L. Press, the Officer in Charge, at San Diego, California. That the cause of said detention was a certain order or decision of deportation entered after an administrative hearing at which insufficient evidence was produced to sustain the deportation charge. That there was no evidence at all showing that the petitioner believes in or taught "The Overthrow of the Government of the United States" by force or violence or any other means.

The petition further recites that there was no evidence to show the petitioner ever had any intent to join the Communist Party, or that he ever subscribed to any of the teachings of said party, or that he had any intent to interfere with, impair or influence the loyalty, morale or discipline of the Military or Naval Forces of the United States, nor was there any evidence that petitioner violated any of the provisions of the Act of June 28, 1940, entitled "An Act to Prohibit Certain Subversive Activities."

Said petition further alleged that petitioner had not been given a fair, impartial and unbiased hearing by the Immigration and Naturalization Service.

### **Jurisdiction.**

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 9, 1953 [R. 27-34]; and a petition for rehearing was denied on March 9th, 1953 [R. 36]. The issues as to which petitioner seeks the Court's review, involving construction of Federal Statutes and the Constitution of the United States, were decided adversely to petitioner, by the United States Court of Appeals, 201 F. 2d 302-306. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

### **Questions Presented.**

1. Whether the Act of October 16, 1918, as amended (8 U. S. C. 137, as amended by the Internal Security Act of 1950; 8 U. S. C. 137 (2) (c); 8 U. S. C. 137-3 (a) is Constitutional.
2. Whether the evidence produced at the administrative hearing is sufficient to sustain the deportation charge.
3. Whether the appellant was given a fair and impartial hearing.
4. Whether the administrative hearing before the Immigration Service was legally conducted and the procedure required by law followed.

### Constitutionality.

Petitioner contends that the Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950, and as applicable to this case, is invalid under the Due Process clause of the Fifth Amendment.

In *Harisiades v. Shaughnessy*, 72 S. Ct. 512, the Court said:

"In historical context the Act before us stands out as an extreme application of the expulsion power."

The Internal Security Act of 1950 went even further than the Act being considered by the Supreme Court in the above case. Counsel does not believe that this amendment can stand the test of the Due Process clause of the Fifth Amendment. This Act made mere membership in the Communist Party of the United States specifically a basis for deportation and eliminated the necessity of proof that the individual believed in, advocated or teaches the overthrow by force or violence of the government.

The Act, as so amended was discussed by the Supreme Court in *Carlson v. Landon*, 72 S. Ct. 525, but the issue in the cases therein decided was not the Constitutionality of the additional basis for deportation, but the right to bail under another Section of the same Act. Therefore, the decision in the *Carlson v. Landon* case is not controlling.

Does deportation by mere proof of membership in the Communist Party of the United States meet the requirements of the Due Process clause of the Fifth Amendment?

That the legislative committee realized the dangerous ground upon which this legislation was propounded is indicated by the following language from the report accompanying the bill:

“The committee approached the problem with care and restraint because it is believed essential that any legislation recommended be strictly in accordance with our constitutional traditions. How to protect freedom from those who would destroy it, without infringing upon the freedom of all our people, presents a question fraught with constitutional and practical difficulties. We must not mortally wound our democratic framework in attempting to protect it from those who threaten to destroy it.”

(U. S. Code Congressional Service (2) 81st Congress, Second Session 1950, Page 3888.)

The Act, as amended, states that an alien may be deported because he was a member of a class. No one can justifiably say that we have no Communists in our midst who are inimical to our security or that if an alien is shown to be hostile to our safety and welfare that we should lack the power to expel him.

However, the concurring opinion of Justice Murphy in the case of *Bridges v. Wixon*, 326 U. S. 135 (163), is so pertinent and applicable that the following is quoted:

“There is no evidence, moreover, that he understood the Communist Party to advocate violent revolution or that he ever committed or tried to commit an overt act directed to the realization of such an aim.

The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. *Schneiderman v. United States*, 326 U. S. 118, 154, 87 L. Ed. 1796, 63 S. Ct. 1333. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, *Free Speech in the United States* (1941) pp. 472-475.

Yet the deportation statute on its face and in its present application flatly disregards this rule. It condemns an alien to exile for beliefs and teachings to which he may not personally subscribe and of which he may not even be aware. This fact alone is enough to invalidate the legislation."

And it was earlier stated in *Bridges v. Wixon, supra*, at page 160, as follows:

"From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirement of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis of their banishment."

The Act is to be condemned not only because it provides for arbitrary expulsion for membership in a class alone, even though said membership be in fact completely without knowledge of the aims and purposes of the class, but also because it affords no discretion to the enforcing authorities to withhold expulsion upon adequate proof of such circumstances. It is submitted that these tenets violate the very substance of the Due Process Clause.

## **The Evidence Is Insufficient to Sustain the Charge.**

The Petitioner was ordered deported on the charge that he had been after entry a member of the Communist Party of the United States. There is insufficient evidence to sustain this charge. The Communist Party of the United States is only mentioned in two places in the hearing record. On page 93 of the certified record the petitioner was asked whether he had ever been a member of the Communist Party of the United States and he refused to answer on constitutional grounds. On page 118 of the certified record a witness for the government was asked:

“Let me put it this way then. Do you have any knowledge as to whether or not Mr. Galvan held any offices in the Spanish Speaking Club unit of the Communist Party of the United States? A. Yes he did.”

Certainly no charge can be sustained on the basis of the petitioner's refusal to answer.

Secondly, as to answer of the witness, the Examining Inspector has assumed facts which were not in evidence, namely, that the Spanish Speaking Club was a unit of the Communist Party of the United States, and, in any event, certainly the Government should not be considered as having sustained its case on such a shred of evidence.

On first blush, it would seem that this is a tenuous argument and that everyone would assume that the testimony taken pertained to the Communist Party of the United States, but it should be pointed out that when the Government chooses to rely on mere proof of membership, without documentary evidence or concrete facts, then the

least that can be afforded the petitioner is the right to have the Government prove the charge which they have lodged in the terms of the statute. If the Government is going to base their case on verbal testimony, at least the verbal testimony should sustain the charge and not leave the same to conjecture.

There is no evidence of petitioner's membership in any Communist Party, documentary or otherwise, except the two statements made by petitioner, pages 173 to 188 of the certified record, which he later refuted, pages 33 to 67 of the certified record, and the questionable testimony of one witness. The Government, to sustain the charge of petitioner's membership in the Communist Party of the United States, relied upon the admissions of the petitioner. The admissions, however, were not, unequivocal and an analysis of the questions in answer to which such admissions were made indicates clearly the insufficiency of the admissions to sustain the charge.

"Q. Then you became secretary of Local 64 prior to the time you joined the Communist Party? A. That's right. [Certified Record, p. 177.]

Q. You were a member of the Communist Party from about 1944 to 1946. Is that correct? A. Something like that. [Certified Record, p. 178.]

Q. Then you were a member of the Communist Party from approximately 1944 to 1946 when you dropped out. Is that correct? A. Yes." [Certified Record, p. 179.]

If the petitioner was a member of the Communist Party of the United States in the community where he has resided for many years, as alleged, certainly the investigative forces of the Government could have shown something concrete, something irrefutable, something a reason-

able man would put confidence in when arriving at an important decision.

This is an important case to the petitioner. As said by Mr. Justice Douglas in his dissenting opinion in *Harisiades v. Shaughnessy, supra*:

“Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.”

Such are the facts in the instant case. If the charge be true, sufficient evidence must have been available. One must assume that either the Government could not or chose not to present it. In either event, the charge should not stand on the evidence here presented.

### **The Petitioner Was Not Given a Fair and Impartial Hearing.**

At the time of the hearing on December 12, 1950, Title 8, Code of Federal Regulations, Section 151.2(d) provided as follows:

“(d) Hearing Officer; additional charges. If during the hearing, it develops that there exists grounds in addition to those stated in the warrant of arrest why the alien is subject to deportation, the hearing officer may lodge additional charges against the alien and shall develop evidence upon such charges in like manner as on the charges contained in the warrant of arrest. . . .”

In this matter the warrant of arrest charged the petitioner with:

"The Act of October 16, 1918, as amended, in that, after entry, he has been a member of the following class of aliens enumerated in Section 1 of the said Act: An alien who was a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow, by force and violence, of the government of the United States;

The Act of October 16, 1918, as amended, in that, after entry, he has been a member of the following class of aliens enumerated in Section 1 of said Act: An alien who was a member of and affiliated with an organization, association, society and group that write, circulates, distributes, prints, publishes and displays, and causes to be written, circulated, distributed, printed, published and displayed, and that has in its possession for the purpose of circulation, distribution, publication, issue and display, written and printed matter advising, advocating and teaching the overthrow by force and violence, of the government of the United States."

In this case the hearing examiner did not lodge an additional charge but a different charge. The charges in the warrant of arrest were abandoned. The petitioner was found deportable on the new and different charge. The hearing examiner attempted to explain this as follows:

"Mr. Tong, with your permission, I would like to lodge an additional charge, and I do lodge at this time the following additional charge, which charge, although similar to that stated in the warrant of

arrest, appears to be the more specific charge. I charge that the respondent is subject to deportation on the ground:

The act of October 16, 1918, as amended, in that he is found to have been after entry a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States." [Certified Record, p. 36.]

The unfairness of this procedure is further emphasized by the fact that the examining officer obtained a stipulation to permit the use of the record previously made in the case, determined that the petitioner had not been out of the United States since the last hearing, lodged a new charge and then said: "I have no further questions to the respondent at this time in regard to the deportation charges." [Certified Record, p. 36.]

The unfairness of this procedure is also demonstrated by the fact that the evidence admitted under the stipulation did not sustain the charges then pressed. But after the examiner lodged the new charge, that evidence, admitted by prior stipulation, became the sole basis for the warrant of deportation which was issued on the newly lodged charge, not the original charges. While it is realized that this is not a criminal matter and that the technical rules involved in pleading to an indictment or information need not be strictly followed, counsel feels that the situation is analogous and that the basic principles of fairness should govern such an administrative proceeding. Surely this Court will not sustain as fair, a situation in which a defendant charged with a crime, stipulated to the

admission of evidence which did not sustain that crime, only to have the prosecutor change the crime with which the defendant was charged and, in the same proceeding, convict him solely on the evidence admitted by the stipulation. It is submitted that the Court should not consider any evidence admitted by such stipulation prior to the lodging of the new charge, and that, eliminating such evidence, there is no evidence remaining to support the findings of fact of the Immigration Officials and of the District Court.

Where the evidence was improperly received and where but for such evidence it would be speculative whether the requisite finding would have been made, then there is deportation without a fair hearing which may be corrected on habeas corpus. Such was stated by the Court in *Bridges v. Wixon*, *supra*, page 156:

"In these habeas corpus proceedings the alien does not prove that he had an unfair hearing merely by proving the decision to be wrong. (*Tisi v. Tod*, 264 U. S. 131, 133, 44 S. Ct. 260), or by showing that incompetent evidence was admitted and considered. *Vajtauer v. Commissioner*, 273 U. S. p. 106. 47 S. Ct. p. 304, 71 L. Ed. 560. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus. See *Vajtauer v. Commissioner*, *supra*."

**The Hearing Was Not Legally Conducted and Procedure Was Not Followed as Required by Law.**

A warrant for the arrest of the petitioner in deportation proceedings was issued on August 13, 1948, by authority of the Attorney General on the charges set forth above. Hearings were conducted on these charges on March 10, 1949 and on January 12, 1950. These hearings were vitiated by the decision of this Court in *Sung v. McGrath*, 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616, which held that the Administrative Procedure Act was applicable to deportation proceedings. Appropriate objection had been made to the procedure used by the Immigration Officials by counsel then representing the petitioner. [Certified Record, p. 79.] Thereafter, Congress, on September 27, 1950 exempted deportation proceedings from the applicable provisions of the Administrative Procedure Act by the enactment of Public Law No. 843, 81st Congress, Second Session.

At the hearing held on December 12, 1950, the counsel then representing the petitioner and the examining officer stipulated to the use of the previous testimony and exhibits which might have cured the defect and illegality of the previous hearings except for the fact that the examining officer thereupon lodged a different charge, not set forth in the original warrant of arrest.

Again counsel for the petitioner wishes to reiterate the argument set forth above in regard to the unfair hearing. It is felt that legal procedure required a regularly conducted hearing on a new warrant of arrest in which

the petitioner would have had a right to defend himself on the basis of the charge set forth therein. Of course, it will be argued, as stated by the examining officer, that the charge was "similar to that stated in the warrant of arrest" [Certified Record, p. 36] but the answer to that argument is that if it was the same charge then there was no purpose in Congress amending the law as was done during the period in which these proceedings were being conducted.

If the hearing was unfair, if there was no legal evidence to support the findings of fact or if error of law was committed, the proceedings should be set aside. Such was stated by this Court in *Kessler v. Strecker*, 307 U. S. 22, 34, 59 S. Ct. 694, 83 L. Ed. 1082.

"If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside."

### Conclusion.

It is respectfully requested that the petition to the Supreme Court of the United States that a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

HARRY WOLPIN,

*Attorney for Petitioner.*

